IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 28 OF 2005

Krishna B. Mayenkar,
Proprietor of Siddhi Sales
Service, H. No.7/121/Angod,
Mapusa Goa. ... Applicant/Accused

versus

1. Shri Kamakshi Aquatics
   Pvt. Ltd., A private Ltd.
   company having its registered
   office at Mumbai and head
   office at 1, Shanteri Van,
   Varkhande Ponda Goa,
   represented by its Managing
   Director Shri P. R. Shirodkar.

2. State of Goa,
   Through Public Prosecutor. ... Respondents

Mr. Arun Bras De Sa, Advocate for the Applicant.

Ms. W. Coutinho, Public Prosecutor for the Respondent No.2.

Mrs. S. Naik, Advocate for the Respondent No.1.

CORAM : N. A. BRITTO, J.

DATE : 28TH JULY, 2006.

ORAL JUDGMENT

This criminal revision is by the accused who has been

convicted and sentenced under Section 138 of the Negotiable Instruments Act, 1881 by the learned J.M.F.C., Panaji in C.C.No.330/OA/2001/C.

2. The accused has been sentenced to undergo S.I. for a period of 5 months and to pay compensation of Rs.76,400/-, to the complainant.

3. The accused preferred an appeal to the Court of Session but the same came to be dismissed by Order dated 18-10-2005.

4. There is no dispute that the complainant used to supply to the accused Spring Fresh Mineral Water. As per the complainant the accused had issued 2 cheques each in the sum of Rs.20,700/- dated 12-10-2000 and 27-11-2000 and when the complainant presented the said cheques for encashment with the complainant's Bank, the same were returned with remarks "Funds Insufficient" on 20-3-2001. The complainant issued the statutory notice which the accused received on 10-4-2001 but neglected to reply or to comply with the same.

5. The complainant, therefore, filed the said complaint under Section 138 of the Act against the accused in which the complainant examined himself and produced the relevant documents. In the course of the cross-examination the accused produced 2 receipts dated 24-10-2000 and 22-12-2000. However, the complainant stated that the said receipts did not relate to the amount due on the cheques issued by the accused. The complainant also examined, his Sales Officer who stated that the said 2 receipts did not pertain to the amount due by the accused on the said 2 cheques. The accused did not enter the witness box to state that the said 2 receipts pertained to the amount due to the complainant on the said 2 cheques issued by the accused.

6. At the hearing of the revision, Mr. Arun Bras De Sa, the learned Counsel on behalf of the accused has submitted that the subject cheques issued by the accused were not issued as regards any debt or liability. Further, Mr. De Sa has submitted that the complainant had admitted that the complainant had received cash under 2 receipts dated 24-10-2000 and 22-12-2000 and this admission on the part of the complainant has not been considered by both the Courts below and, therefore, interference

of this Court is called for to set aside the Judgments of both the Courts.

7. Mrs. S. Naik, the learned Counsel on behalf of the complainant has submitted that one of the said receipts, namely the receipt dated 24-10-2000 was issued much prior to the issuance of the subject cheques and in case the accused had paid the amount to the complainant, the accused would not have issued at least one of the cheques. It is further submitted by Mrs. Naik on behalf of the complainant that the cheques were presented for encashment as late as 7-3-2001 and the statutory notice was sent on 3-4-2001 and in case the said cheques were not issued by the accused in payment of a debt or liability, other then represented by the said 2 receipts, the accused would have certainly reacted upon the receipt of the notice and would have replied to the same or at least would have asked the Bank to stop the payment of the said 2 cheques. The submissions made by Mr. De Sa, the learned Counsel on behalf of the accused appear to have also been made before the learned Additional Sessions Judge and have been dealt by her in para 12 of the Judgment. The submissions made on behalf of the complainant,

reproduced herein above are certainly convincing. That apart, there is no dispute that the complainant used to supply Mineral Water to the accused from time to time. The complainant as well as the complainant's Sales Officer had categorically stated that the said 2 receipts issued on account of payment made by cash by the accused did not relate to the amount due by the accused towards the cheques issued by him. In the light of the said statements made by the complainant and his witness, it could not be said there was any admission at all that the complainant had admitted that the said receipts represented the amount due on the cheques by the accused. It is now well settled that the presumption under Section 139 of the Act though rebuttable cannot be rebutted only by way of suggestions.

8. The learned trial Court had referred to the case of **Hinten Dalal** v. **Bretindranath Banerjee**(2001(5) Supreme 49) wherein the Supreme Court had observed that the effect of the presumption under Section 139 of the Act was that the presumption had to be rebutted by proof and not by bare explanation which is plausible. In fact, the accused had not given any explanation much less a satisfactory explanation as to

why he had issued the said cheques and, therefore, both the Courts were fully justified in convicting and upholding the conviction of the accused, respectively.

9. As far as the sentence is concerned, it is pointed out that out of 5 months S.I., the accused has undergone about 24 days between 18-10-2005 and 14-11-2005 before the present criminal revision could have been filed. It is also pointed out on behalf of the accused that out of the compensation of Rs.76,400/-, the accused has deposited before this Court a sum of Rs.41,400/- leaving a balance of Rs.29,000/- to be paid by the accused to the complainant. In the aforesaid circumstances, it is submitted by the learned Counsel Mr. De Sa that the period of imprisonment of 24 days be considered as substantive sentence imposed upon the accused and since the accused has also paid the amount due on the said 2 cheques, namely Rs.41,400/- no compensation be ordered to be paid. I am not inclined to accept the submission of the learned Counsel Mr. De Sa. Nevertheless, in my view, there is scope for reduction of sentence from 5 months to 2 months considering the amount involved in the case. In other words, the substantive sentence imposed by the learned

J.M.F.C. of 5 months shall be reduced to 2 months S.I. The period of 24 days undergone by the accused shall be set off against the said period of 2 months. The sum of Rs.41,400/- deposited by the accused shall be paid to the complainant. An amount of Rs.29,000/- is still due and payable by the accused to the complainant. In case the same is not paid by the accused to the complainant forthwith, the accused shall undergo S.I. for a period of 2 months. In other words, the period of 5 months S.I. ordered to be undergone by the accused in default of payment of compensation is hereby modified.

10. Criminal Revision is disposed of on the above terms with no order as to costs.

N. A. BRITTO, J.

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